JANUARY 10. 1785.

INFORMATION

FOR

The Rev. MR WILLIAM LESLIE, Miniſter of the Pariſh of St. Andrews and Longbride, Pannel;

AGAINST

ALEXANDER PENROSE-CUMMING of Altyre, Eſq; with concourſe of His MAJESTY's Advocate, Proſecutor.

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THE ſingle queſtion that comes at preſent under the deliberation of the Court, is, Whether Mr Cumming of Altyre has a right to bring a proſecution at his own inſtance, and with the concourſe only of his Majeſty's Advocate, for the purpoſe of convicting the Pannel of the crime of Perjury, which, by the Criminal Letters, is laid to his charge?

The Pannel is too conſcious of his own innocence, to conſider this queſtion as of any conſequence to himſelf, but in ſo far as the determination of it may prevent his being expoſed to further trouble and expence. Could he, indeed, permit himſelf to ſuppoſe, that any unprejudiced perſon thought ſo hardly of him, as to believe, that, on any conſideration, he could be guilty of ſo heinous a crime as that of wilful

wilful and corrupt Perjury, nothing would be ſo agreeable to him, as to join iſſue with his Proſecutor, upon the facts charged in the Criminal Letters, in order that his conduct might be fully inveſtigated, and made public:—But as he is under no apprehenſion that the invidious and calumnious charge which the Proſecutor has thought fit to exhibit, will meet with any credit whatever, he cannot think himſelf at liberty, and ſhould indeed hold himſelf wanting in duty to the Laws of his Country, if he were to permit his caſe to be urged, in future times, as a precedent for ſanctifying ſimilar proſecutions at the inſtance of private parties, who can qualify no proper intereſt to maintain them.

It is now fifty years ſince the Oath of Truſt and Poſſeſſion was introduced by Statute: But although that oath has in every county been taken by many men of the moſt reſpectable characters, who were poſſeſſed of no other freehold-qualifications than bare liferents, or wadſets of ſuperiority, all of which the Proſecutor and his adherents are now pleaſed to term nominal and fictitious; yet, if the Pannel is well informed, it has been reſerved to Mr Cumming of Altyre, to be the firſt to attack a Freeholder whoſe qualification was ſo conſtituted, as guilty of Perjury, for having taken that oath,—and to the Pannel, to be made the firſt object of a criminal proſecution on that account. In that reſpect, the preſent caſe is accordingly a new and extraordinary one; and therefore, the Pannel will be forgiven for endeavouring, by way of introduction to the arguments he is in the ſequel to offer upon the queſtion now at iſſue, to trace out to your Lordſhips, by what means, and from what motives, he comes to be engaged in that queſtion.

Previous to the year 1768, the Roll of Freeholders for the County of Moray was compoſed partly of Gentlemen poſſeſſed of conſiderable landed property, and partly of others whoſe qualifications reſted entirely upon liferents, or wadſets of ſuperiority.

At

At the General Election which took place upon the 22d of April 1768, there were two Candidates for the Repreſentation of the County, *viz.* The Honourable George Duff, brother to Earl Fife, and General Francis Grant: And although the former had a majority of the real and ſubſtantial Proprietors in his intereſt, yet the latter, who ſtood himſelf on the Roll in virtue of a right of bare ſuperiority, prevailed in the conteſt.

On this occaſion, the Oath of Truſt and Poſſeſſion was put to, and taken by the following Gentlemen, all of whom had been enrolled on liferents or wadſets of ſuperiority—

Robert Anderſon of Linkwood,
Capt. Thomas Dunbar,
Capt. Charles Grant,
James Grant of Carron,
Ludovick Grant of Grange-green,
Sir James Colquhoun of Luſs,
Sir Archibald Grant.

Shortly after this Election, a warm conteſt for the Repreſentation of the County in the next Parliament, commenced between the Honourable Arthur Duff, patroniſed and ſupported by his brother Earl Fife,—and General Grant, who had the intereſt of the Duke of Gordon, and of the Family of Grant, in his favour. This conteſt was carried on for years previous to the General Election which took place in 1774, with equal ſpirit and keenneſs on both ſides; and no expence or trouble was ſpared, both Parties ſtraining every nerve to carry their point, by ſplitting their eſtates to the utmoſt, in the view of granting wadſet or liferent-qualifications to friends in whom they could confide.

During the heat of this conteſt, the Pannel obtained a conveyance to a wadſet which had been granted over a part of the eſtate of Brodie, the owner of which was then firmly, and not without good reaſon, attached to the intereſt of Lord Fife, to whoſe ſiſter he had been for ſome time married.

ried. The Pannel accordingly claimed to be enrolled at Michaelmas 1774: and altho' an objection was then ſtated to his qualification by General Grant, that objection was over-ruled by the Freeholders; and the General acquieſced in their judgment, without ever pretending to bring it to a challenge before the Court of Seſſion, under the authority of the Act of the 16th of his late Majeſty.

The Records of the Court of Seſſion bear ample teſtimony of the zeal that was ſhewn on the part of the Duke of Gordon, and of the Family of Grant, to keep the County in their own poſſeſſion; and of the anxiety with which every qualification poſſeſſed by Gentlemen in a contrary intereſt, was ſcrutiniſed and ſifted. But, this notwithſtanding, Mr Arthur Duff prevailed at the General Election which took place in 1774.

It ſhould ſeem, that, in 1780, when a New Parliament was called, whoſe proceedings during the latter part of its exiſtence will ever be remembered, as forming a remarkable part of the Hiſtory of Britain, there had been a coalition of intereſts in the County of Moray; for, on that occaſion, Lord William Gordon was elected without oppoſition.

It is well known to your Lordſhips, that there has lately appeared, in different corners of the country, a great ſpirit for Reformation, and for amending, in ſundry reſpects, the political conſtitution of one branch of the Legiſlative Body. Whether any-thing of that kind is at all neceſſary, or even expedient, it is not the buſineſs of the Pannel to enquire: But it is no doubt true, that ſeveral of the Landowners of this County of Moray joined in the cry, and teſtified a violent deſire to procure ſome alteration of the Law in reſpect to the qualification of Freeholders, eſpecially by prohibiting, in future, any perſons from being enrolled, either upon liferents, or wadſets of a bare ſuperiority.

The Pannel has, however, reaſon to believe, that upon more cool reflection, ſome of the Gentlemen of the County, who had at firſt adopted this extenſive plan of Reformation,

formation, began to be ſenſible, that they had carried their views rather too far: But there ſtill remained a few zealots, ſeemingly fired with a degree of political enthuſiaſm, which led them to think that it only depended upon their own exertion, to obtain the gratification of their utmoſt wiſhes. Theſe Gentlemen accordingly began to inveigh moſt liberally in the public News-papers, againſt ſuperiority qualifications,—all of which, without diſtinction, they affected to conſider as perfectly nominal and fictitious; and to declare their reſolutions, to leave no ſtone unturned, to baniſh them for ever from the County of Moray.

A Meeting of theſe Reformers was accordingly held at Elgin upon the 4th of November 1783, when they came to ſundry reſolutions, of which notice was given to the other Gentlemen of the County, by circular letters ſigned by Mr Brodie of Brodie, who acted as Preſes on that occaſion. Theſe Letters were expreſſed in the following terms: '—Sir,

' At a meeting of Independent Freeholders of the County ' of Elgin and Forres, yeſterday, at Forres, the Gentle- ' men (after drawing up, and ſigning a Petition to the ' Houſe of Commons, ſtating, and praying for redreſs ' in the preſent unconſtitutional mode of their Parlia- ' mentary Repreſentation) with a view not only to give ' Parliament a juſt idea of the reality of their grievances, ' but alſo as the moſt apparently effectual method of con- ' tributing to their removal, came to the following reſolu- ' tions, and bound themſelves thereto in the ſtrongeſt man- ' ner:—That, on the day previous to the next Election of a ' Member of Parliament for this County, they ſhould meet ' at Elgin, and determine *by a throw of the dice*, which of ' their number ſhould be their Repreſentative in the next ' Parliament; and him they are to ſupport, and vote for, at ' the Election: That, on the day of Election, immediately ' after their chooſing their Preſes and Clerk, they are one ' and all to put the Oath againſt Bribery and Corruption, ' and the Truſt Oath, to every perſon on the Roll of Free-

 ' holders,

‘ holders, indiſcriminately, who is not a real Proprietor of
‘ Lands in the County : That they are thereafter to endea-
‘ vour, by every means poſſible, to convict of Perjury, ſuch
‘ perſons taking the above oaths, as they thought had not
‘ real qualifications : That if, on the day of Election, they
‘ ſhould prove a majority of Real Freeholders on the
‘ Roll, (notwithſtanding their being outvoted by the nomi-
‘ nal and fictitious medley of Barons) ; in that caſe, they
‘ were moſt ſtrenuouſly to ſupport their own choice of a
‘ Repreſentative as above, by preferring a Petition to Parlia-
‘ ment, and having the merits of their election tried by
‘ that bulwork of Britiſh Liberty, a Committee of the
‘ Houſe of Commons.—For this purpoſe, they have bound
‘ themſelves, and their heirs, to pay to the amount of One
‘ Hundred Guineas, if neceſſary, to carry through theſe
‘ meaſures : And inſtructed me as their Preſes, to commu-
‘ nicate the above, the ſubſtance of their reſolutions, to you
‘ a Real Freeholder of the County, for the *ſole* purpoſe of
‘ affording you an opportunity of joining them in their
‘ glorious ſtruggle for Independency.—Our next Meeting
‘ is at Forres on Tueſday the 11th inſtant, at noon ; againſt
‘ which time, ſhould it be convenient for you to attend, it
‘ is expected you will ſignify your intentions in writing,
‘ to, Sir, your moſt obedient humble ſervant,

(Signed) JAMES BRODIE.’

The Gentlemen who were preſent at the Meeting at which theſe reſolutions were entered into, and have aſſociated under the name of ‘ The Independent and Real Free-
‘ holders of the County of Moray,’ but poſſeſs only a ſmall proportion of the landed property within it, were, Mr Brodie of Brodie, Mr Cumming of Altyre the preſent Proſecutor, Mr Francis Ruſſel of Weſtfield, Advocate, Col. Hugh Grant of Moy, John Gordon of Grieſhop, and John Innes writer to the ſignet,—all of them perfectly well qualified to repreſent the County in Parliament, and therefore in every ſhape juſtified in leaving their ſeveral pretenſions to reſt upon a throw of the dice.

At another Meeting of theſe aſſociated Gentlemen, held upon the 30th of March laſt, the following reſolution was entered into, and was by their orders inſerted in the Edinburgh News-papers of the 3d of April :—' The Real Free-
' holders of the County of Elgin and Forres, aſſociated in
' order to try, as far as warranted by Law, the merits of
' fictitious votes increaſed in that County to above four to
' one of real votes, entreat, That any Gentleman of family,
' a real voter in the county, who, from abſence, or indiſpo-
' ſition, has been prevented from acceding to their plan,
' will do it immediately by notification to the Preſes; or at
' leaſt not engage himſelf, or vote againſt a meaſure adopted
' ſolely with a view of reſtoring the juſt, the invaluable
' right of a Freeholder (of which they are at preſent to-
' tally deprived) to thoſe in whom it is really veſted by the
' Conſtitution. They are reſolved not to vote for, or give
' their intereſts to, any Candidate, who either is himſelf a
' Nominal Freeholder, or ſtands ſupported by ſuch, as they
' can expect little attention to the diſtreſs of the country,
' from thoſe who muſt have accompliſhed their ends thro'
' corruption and perjury.

' (Signed) JAMES BRODIE of Brodie, *Preſes*.'

The election for a Repreſentative from the County to the preſent Parliament, came on upon the 15th of April laſt; and the following account of what paſſed on that occaſion, was given to the Public by the Aſſociation, in the Aberdeen Journal of the 19th of that month :—' This day came on the
' election of a Member to ſerve in Parliament for the Coun-
' ty of Elgin. Earl Fife appeared as Candidate, ſupported
' by only four of the Real Freeholders of the County. The
' Gentlemen Freeholders *aſſociated againſt nominal and fictitious*
' *votes*, unanimouſly ſet up Alexander Penroſe-Cumming of
' Altyre, Eſq; as Candidate, in oppoſition to the Earl Fife.
' Earl Fife was choſen by a great majority of the perſons
' ſtanding upon the Roll of Freeholders of the County. A
' great majority of the Real Freeholders, who are Proprie-

' tors

'tors of eſtates in the county, voted for Mr Cumming of 'Altyre: But they were outvoted by above double their 'number, of theſe perſons calling themſelves Freeholders, 'who have no eſtates in the county. The oath appointed 'by the 16th Act of the 7th of George II. commonly called 'the Oath of Truſt and Poſſeſſion, was put to all thoſe per-'ſons who have no eſtates in the county, and taken by 'them all, two Gentlemen excepted. The Independent Free-'holders aſſociated for the purpoſe of purſuing all legal 'meaſures for obtaining redreſs of the grievance of nomi-'nal and fictitious votes, are reſolved to proſecute, for Per-'jury, in a competent Court of Law, all thoſe perſons who 'have, without the qualification of landed property, taken 'the Oath of Truſt and Poſſeſſion. Intimation of their re-'ſolution was given in Court before the oath was put; and 'a proteſt was taken againſt the election of Earl Fife, upon 'the ground, "That the majority of voters for him, were "nominal and fictitious; and that a great majority of the "real Freeholders preſent, voted for Mr Cumming of Altyre; "and therefore, that he ought to be found the Member "duly elected."

This was a general denounciation againſt all perſons whatever who had taken the oath without being poſſeſſed of the property, or *dominium utile*, as well as of the ſuperiority of the lands upon which they had been enrolled: And although ſuch qualifications are perfectly conſonant both to the preſent, and to the moſt ancient principles of the Conſtitution of Parliament, which not only allowed, but even compelled the attendance of all thoſe who held *in capite* of the Crown; yet theſe aſſociated Patriots might perhaps have been excuſable, if, miſled by a blind zeal for Reformation, they had carried their threats into execution, by bringing criminal proſecutions againſt all thoſe who took the oath at the Meeting for Election. By doing ſo, their conduct might have correſponded with their profeſſions.—
—But, inſtead of purſuing that plan, for the purpoſe, not

of

of indulging their own private ill humour, but of reviving a great and important general queſtion, Whether liferent and wadſet-rights of ſuperiority were to be conſidered, in the eye of Law, as good and real, or only as nominal and fictitious qualifications? they thought proper to pitch upon three Gentlemen, who appeared to them to ſtand in a particular ſituation, not in reſpect to the *nature* of their freeholds, but on account of a ſuppoſed *defect of title* in one of themſelves, from whom theſe freeholds were derived. It is in vain, therefore, they can now attempt to aſcribe the preſent proſecution to any laudible motive; and every perſon muſt be ſatisfied, that it ſprings from peeviſhneſs, diſcontent, or diſappointed ambition alone. It is not, indeed, to be wondered at, that theſe Patriots ſhould ill-bruik their being able only to bring ſeven or eight Freeholders to oppoſe the election of the preſent Member, when they themſelves admit, that there are no fewer than twenty-two real Freeholders upon the roll. *Quis talia fando temperet a lachrymis?*

As the Criminal Letters are in the poſſeſſion of your Lordſhips, it is unneceſſary to give a particular recital of them here. It will ſuffice at preſent to obſerve in general, that they proceed at the inſtance of Mr Cumming of Altyre alone; and that his Majeſty's Advocate has not thought it proper for him, in diſcharging the duties of his office, to give any countenance to the proſecution. The World may perhaps be apt to think, that the private proſecutor, who ſtands enrolled as a Freeholder in the County of Banff, upon a liferent-ſuperiority of lands belonging to the Duke of Gordon, and that ſome other of his aſſociates, who have ſplit their eſtates for the purpoſe of creating ſuch qualifications, and whoſe neareſt relations are poſſeſſed of freeholds conſtituted in that manner, might have had the charity to believe, that the Pannel, who is a Gentleman by birth and education,—who has ever maintained a fair and an unexceptionable character,—and has always diſcharged

the ſacred functions of that order to which he particularly belongs, with general ſatisfaction,—would not have been guilty of ſo criminal an act, both in the eyes of God and man, as that of which they have thought proper to accuſe him. That, however, he leaves to their own feelings; and ſhall only add, That if, while they continue to tax him with ſuch a crime, he were to aſcribe their conduct to truly patriotic and laudible motives, he ſhould be forced to confeſs, in the words of the Poet, '*Nemo tibi, nemo mihi credet, Poſthume.*'

When the Criminal Letters were read in Court, an objection was ſtated on the part of the Pannel, to the Proſecutor's title; and the Counſel on both ſides having been heard fully on that point, your Lordſhips ordered both parties to put in Informations:—And, in obedience to that order, the preſent Information is humbly offered on the part of the Pannel.

THERE is perhaps no particular in which the juriſprudence of modern Nations, differs more from that of ancient States, than in the manner of inſtituting Criminal Suits. Popular actions were the great favourites of Rome, and thoſe other ancient republics, of whoſe laws and modes of government we are informed by Hiſtory. They were indeed natural in thoſe States, where every man, by the form of the Conſtitution, was conſidered to be veſted with a part, not only of the legiſlative, but of the executive power: And while virtue and purity of manners, which formed the diſtinguiſhed features of the Ancient Republics, in the more early periods of their government, continued to be the ſole motives of criminal proſecution, no danger was to be dreaded from its being permitted to every citizen, to vindicate public wrongs, as well as private injuries.

It ſoon, however, came to be diſcovered, that this part of the Public Law was to be productive of great abuſe; and that in proportion as the ancient ſimplicity of manners decreaſed,

creaſed, and depravity and corruption gained ground among the citizens, the miſchief was to increaſe. Proſecutors, inſtead of reſorting to Criminal Courts, only from motives of virtue, and a love of their country, frequently made uſe of the privilege which the Law allowed them, for the purpoſe of indulging their own private reſentment; and converted a rule which was intended for the moſt ſalutary ends, into an inſtrument of oppreſſion and calumny.

To guard againſt this evil, the Law was obliged to interpoſe. At firſt, an oath of calumny was introduced; but that not being found a ſufficient remedy, a ſeverer reſtraint was impoſed, by obliging the proſecutor to ſubmit to a ſimilar puniſhment, in the event of his failing to convict the perſon whom he had charged as a criminal.—'Ne autem 'temere quis per accuſationem in alieni capitis diſcrimen 'irruerit, neve impunita eſſet in criminalibus mentiendi 'atque calumniandi licentia, loco jurisjurandi calumniæ 'adinventa fuit in crimen ſubſcriptio, cujus vinculo cavet 'quiſque quod crimen objecturus ſit, et in ejus accuſatione 'uſque ad ſententiam perſeveraturus, dato eum in finem 'fidejuſſore, ſimulque ad talionem ſeu ſimilitudinem ſup-'plicii ſeſe obſtringet, ſi in probatione defeciſſe et calumni-'atus eſſe deprehenſus fuerit.' *Voet de accuſat. et inſcript.* §. 13.

Theſe checks proved too ſevere, and gave riſe to a miſchief of another kind. They might indeed prove a compleat bar to falſe accuſations; but they alſo came in effect to be a prohibition of proſecutions, as it was ſeldom to be expected that any perſon ſhould run the riſk of expoſing himſelf to puniſhment, merely for the ſake of bringing a real offender to juſtice.

Amongſt thoſe rude and uncultivated nations which overſpread Europe upon the declenſion of the Roman Empire, it was found neceſſary to lay hold of the paſſion of avarice, both for the purpoſe of repreſſing crimes and injuries, and for reſtraining the reſentment of individuals, againſt whom, or their near relations, ſuch crimes or injuries had been committed.

committed. It is accordingly well known, that in theſe nations, pecuniary compoſitions for crimes were introduced; and the Laws of the Burgundians, of the Salians, of the Alemanni, of the Bavarians, of the Ripuarii, of the Saxons, of the Angli and Thuringi, of the Friſians, of the Longobards, and of the Anglo-Saxons, are full of theſe compoſitions, for all ſorts of offences, from the moſt trifling injury, to the moſt atrocious crimes, not excepting even High Treaſon, by imagining and compaſſing the death of the Sovereign.

But upon theſe ſyſtems of criminal juriſprudence, the wiſdom of modern times has greatly improved; and rules of proceeding have been adopted, equally calculated to bring real offenders to condign puniſhment, and to prevent groundleſs and vexatious proſecutions. For theſe purpoſes, a *calumniator publicus*, who acts at his peril in the execution of Criminal Law, has been introduced in moſt of the States in Europe; and, in ſome, additional barriers have been ſet up for the protection of innocence.

Monteſquieu, after mentioning the great abuſe that aroſe from that ſwarm of informers which appeared under the Roman Emperors, when the republican maxims were ſtill in obſervance, expreſſes himſelf as follows:—'Nous avons 'aujourdhui une loi admirable: C'eſt, celle qui veut que 'le prince etabli pour faire executer les loix, prepoſe un 'officier dans chaque tribunal pour pourſuivre en ſon nom 'tous les crimes; de ſorte que la fonction des dilateurs eſt 'inconnue parmi nous; & ſi ce vengeur public etoit ſoup-'conne d'abuſer, de ſon miniſtere on l' obligeroit, de nom-'mer ſon denonciateur.' *De L'Eſprit des Loix, liv.* 6. *ch.* 8.

In ſome countries, ſo ſtrong an averſion has been conceived from the idea of criminal proſecution at the ſuit of private individuals, as to reſtrain them from proſecuting even thoſe offences which were known in the Roman Law by the name of *Delicta Privata*.—This in particular is the caſe in Holland: 'Delictorum privatorum quatuor vulgo con-

'ſtituuntur

‘ ſtituuntur ſpecies, puta, furtum, rapina, damnum in-
‘ juria datum, (quod ſcilicet lege Aquilia coercetur cujuſque
‘ tractatio jam in libro 9. tit. 2. abſoluta fuit), et injuria
‘ ſeu contumelia. Cæterum moribus noſtris ex delictis hiſce
‘ privatis fere fiſcus ſolus, id eſt publicus nomine fiſci con-
‘ ſtitutus accuſator ad pœnas agit, eodem modo quo in pu-
‘ blicis criminibus ; privati vero qui delicto læſi ſunt, ad
‘ proprium tantum damnum perſequendum, non ad pœnam
‘ actionem habent, ſic ut ex moribus noſtris inter privata
‘ delicta et crimina publica non multum hac in parte in-
‘ terſit : *Voet de Privatis Delictis*, § 3. — Cæterum moribus
‘ noſtris nullus privatus accuſationem vindictæ publicæ per-
‘ ſequendæ gratia inſtituere poteſt, ſed ſolus fiſci procura-
‘ tor, prætores, aliique ſimilis officii nomine, delationem
‘ tantum criminis ad futurum accuſatorem publicum, fa-
‘ cientibus illis, qui jure civili ad accuſandum admitte-
‘ bantur : Unde non modo differentia inter crimina publica
‘ et delicta privata, quantum ad pœnæ perſequendæ modum
‘ et ordinem, nunc apud nos ſublata eſt, ut dictum, Tit. *De*
‘ *Furtis*, *num.* 15. ſed etiam diſcrimen deferendi crimina in
‘ judicium, per accuſationem, et per inquiſitionem.’ *Voet de accuſat. inſcript.* § 18.

In England, no criminal proſecution can be carried on, either by way of indictment, or by way of information, but in the name of the King. When the procedure is by way of indictment, it muſt, in the firſt place, not only be preſented to, but alſo be preſented by the Grand Jury, whoſe buſineſs it is to inquire, whether there be a ſufficient cauſe to call upon the party that is accuſed, to anſwer it. If they return ‘ Not a true bill,’ no further proceedings take place ; and when the accuſed is actually put on trial, in conſequence of their having found a true bill, it is becauſe ‘ the Jurors ‘ for our Lord the King, upon their oaths, preſent that,’ &c. And when, on the other hand, the procedure is by way of information, it is filed by the King’s Attorney-General *ex officio*, in ſuch enormous miſdemeanours as peculiarly tend to

diſturb his government, or to offend him in the regular diſcharge of his royal functions. Informations are indeed likewiſe filed by the Clerk of the Crown, upon the complaint or relation of a private informer, for groſs and notorious miſdemeanours, ſuch as riots, batteries, libels, &c. which, although not peculiarly tending to diſturb the government, yet, on account of their magnitude and pernicious example, deſerve the moſt public animadverſion. This mode of procedure, by which the Clerk of the Crown ſupplied the place of the Grand Jury, and acted as the public accuſer, came, however, to be juſtly complained of, as being often made the handle of harraſſing the ſubjects with vexatious ſuits. It was therefore enacted by the Statute of the 4th and 5th of William and Mary, cap. 18th, That the Clerk of the Crown ſhould not file any information, without the expreſs order of the Court of King's Bench; and that every perſon permitted to promote ſuch Information, ſhould give ſecurity by a recognizance for L. 20, to proſecute effectually, and to pay coſts, if allowed, to the perſon accuſed.

It is therefore clear, that in neither of theſe ways, can a criminal trial take place in England, at the ſuit of a private individual.—It is true indeed, that there is another mode of proceeding, by what is called an appeal: But that is now totally in diſuſe, and was always limited to a very few crimes, *viz.* murder, rape, larceny, and arſon or fire-raiſing; and the allowing private individuals to proſecute theſe offences in that way, probably took its riſe from the old practice of giving pecuniary compoſitions to the perſons who were injured by ſuch offences.

It will probably be found a difficult taſk, to attempt to trace, with preciſion and certainty, the more ancient criminal juriſprudence of this country. Were we ſufficiently warranted to conſider the *Regiam Majeſtatem* as an authentic Treatiſe on the Law of Scotland, it ſhould ſeem, that anciently the primary right of criminal proſecutions, was lodged in thoſe who were ſufferers by crimes; and that it was only

only in the caſe of their not exerting it, that the Crown could take it up. This was indeed exceedingly natural, as long as compoſitions either in money or cattle were the puniſhments inflicted on criminals, or while the ſuppoſed guilt or innocence of an accuſed perſon was to reſt upon the iſſue of a ſingular combat or battle with the accuſer. This practice, however, wore out by degrees. Proſecutions were reduced into a pretty regular form by the Statutes of Alexander the II. which introduced indictments, and forbid any perſon to be arreſted by the King's ſervants, without firſt being given up in dittay, in conſequence of an inquiſition made by a Jury, conſiſting of the Chief Magiſtrate of the place, and three reputable perſons in the neighbourhood; after which, the perſons accuſed were attached, and brought to trial before the Juſticiary. 'Statuit Dominus 'Rex Alexander illuſtris, Rex Scotiæ, de concilio et aſſenſu 'venerabilium patrum epiſcoporum, abbatum, comitum, 'baronum, ac proborum hominum ſuorum Scotiæ, ut Ju-'ſticiarius ſuus Laudoniæ, diligentem et privatam inquiſi-'tionem faciat de malefactoribus terræ, et eorum receptatoribus, per ſacramenta trium hominum bonorum et fide-'lium, una cum ſacramento ſeneſcalli, de ſingulis villis ſin-'gulorum vicecomitatuum infra balliam ſuam, præter-'quam in Galluidia, qui leges ſuas habent ſpeciales: Et ſi 'quos per dictam inquiſitionem legaliter factam invenerit, 'eos feſtinanter per ſervientes Domini Regis, cum auxilio 'hominum domini villæ, ſalvo faciat attachiari, et ad cer-'tum diem et locum coram juſticiario per fidele vici-'netum tranſeant.' *Stat. Alex. II. cap.* 2.—This was ſomething a-kin to the mode of trial by indictment, that now prevails in England; and it is probable that no particular perſon was named as an accuſer. The accuſation was produced upon inquiry made by the Court; and it is accordingly to be obſerved, that in the form of an indictment given by Sir George Mackenzie in his Criminal Treatiſe, no mention is made of its proceeding at the inſtance of the King's

King's Advocate, or of any other perſon. It came afterwards to be the practice, for the Juſtice Clerk to take up dittay; and he is mentioned as the proper Officer for doing ſo, in many Statutes from the reign of James I. down to that of James VI. During that period, it was his province to make out indictments, and to bring criminals to trial; and altho' by the Act 1587, c. 82, Commiſſioners were appointed for taking up dittays, yet indictments proceeded as formerly; and it was accordingly found in the caſe of M'Culloch *contra* Gordon, December 5. 1666, That an indictment of Treaſon needed no ſolemnities of execution, but might be delivered by the Juſtice Clerk's ſervants.

In this manner were proſecutions by way of indictment carried on, till the paſſing of the Act of the 8th of Queen Anne, cap. 16. By which, crimes to be tried at the Circuits, were ordered to be inquired after by the Juſtices of the Peace, on certain days of the year; and the evidence was appointed to be tranſmitted to the Juſtice Clerk, or his Deputes, at Edinburgh, at leaſt forty days before the holding of the Circuits, to be given by him to the King's Advocate, by whom, and not by the Juſtice Clerk, indictments are now drawn up.

By the Act 1587, cap. 77. it was enacted, 'That the 'Theaſurer and Advocate perſew ſlaughteris and utheris 'crimes, althoucht the parties be ſilent, or wald uther-'wayes privily agree.' But, to infer from thence, that dilinquents of that ſort could not be tried before that Statute, without the appearance of a private party to proſecute, is totally inconſiſtent with what has already been ſtated with regard to the mode of proceeding by way of indictment. The object of this Statute, was to give to the two Officers therein named, the power of proſecuting in the way of a Criminal Summons, which, it is believed, was for a long time after confined to trials before the Court of Juſticiary at Edinburgh.

But

But although it is under this Statute that the Advocate's title to proſecute in his own name was originally derived, it is an undoubted fact, that for near two centuries paſt, the power of proſecuting criminals in this manner, *ad vindictam publicam*, has been underſtood to belong to that Officer alone, with the exception of a few caſes, in which private individuals are ſuppoſed to be ſo peculiarly intereſted as to give them a right to proſecute in their own names, although the Advocate ſhould decline to lend them his aid, or to appear in behalf of the Public; and what theſe caſes are, and ought to be, it requires no great depth of judgement, and little reſearch, to diſcover.

In all crimes which affect only the Public, or the good order and peace of the State in general, ſuch as blaſphemy, hereſy, and others of a ſimilar nature, it is an agreed point that the King's Advocate can alone appear as a proſecutor; for, although nicely and critically ſpeaking, every perſon may be ſaid to have an intereſt that offenders ſhall be brought to puniſhment, yet, to permit ſuch an intereſt to be aſſumed as a title for carrying on criminal proſecutions, were at once to introduce popular actions, the evil conſequences of which are too apparent to be countenanced by the Law of this or any other well-governed realm.

The caſe is, however, exceedingly different in reſpect to crimes which are directly committed againſt individuals, and tend to hurt them eſſentially, and peculiarly. Little danger can ariſe from permitting ſuch individuals, not only to ſeek reparation by a civil action, but alſo to proſecute the perſon by whom they have been injured, *ad vindictam publicam*. It is accordingly univerſally underſtood, that any of the King's ſubjects whoſe perſon has been maimed or abuſed, whoſe houſe has been broke into, whoſe goods have been taken from him either by robbers or by thieves, or whoſe character or reputation has been ſtigmatiſed in a particular manner, may bring a criminal proſecution in his own name, and without the neceſſity of the King's Advocate

giving his inſtance in ſupport of it. Nay, the Law has gone ſtill further, by allowing the heir to proſecute the murderer of his predeceſſor, and the huſband to demand puniſhment upon the perſon who has committed a rape upon the body of his wife.—There, however, it is equally founded in reaſon. The perſon that is murdered, no longer exiſts; it is therefore but reaſonable to give the power of avenging his death, to his Repreſentative:—and in the caſe of rape, the huſband is himſelf injured in the higheſt degree.

The diſtinction that has been now ſtated, appears to be perfectly founded in common ſenſe, and ſound policy; and has accordingly received the ſanction of all the Writers upon the Law of this country, and of the practice of its Criminal Courts.

Sir George M'Kenzie expreſſes himſelf, on this ſubject, as follows:—'It is indeed the intereſt of the Commonwealth, '*ne crimina maneant impunita*; and therefore, in crimes which 'immediately concern the welfare of the State, ſuch as 'treaſon, ſedition, &c. every man may be an accuſer. But 'it is likewiſe the advantage of every private perſon, that 'it ſhall not be lawful to every malicious enemy, upon the 'pretence of a public good, to trouble and vex ſuch againſt 'whom they carry malice, upon a pretence of a criminal 'purſuit; and therefore, according to the Common Law, *In* '*privatis delictis non admittebatur ad accuſandum, niſi qui ſuam aut* '*ſuorum injuriam inſequebatur*.—And Farinac. ſtates *ſuorum injuriam* to extend *ad quartum gradum*, and it ſeems to be extended with us within degrees deſcendant: And that every 'perſon may not, in our Law, purſue any private crime, 'appears from the former chapter, p. 225.'

Mr Erſkine, after mentioning the diſtinction in the Roman Law between public and private crimes, the former of which might be proſecuted by any member of the Commonwealth, and the latter only by the private party injured, proceeds

proceeds as follows :—' But this diviſion of crimes is not re-
' ceived by our practice. It was at no period of time com-
' petent by the Law of Scotland, to any private perſon, other
' than the party himſelf who had ſuffered damage in his
' perſon, eſtate, or reputation, or in caſe of his death, his
' next of kin, to proſecute crimes, however atrocious, the
' crime of High Treaſon only excepted. *Reg. Majeſt.* L. IV.
' cap. 2. And this rule obtains at this day in Treaſon itſelf.—
' On the other hand, his Majeſty's Advocate, who repreſents
' the Community in this queſtion, has authority from the
' Sovereign, who is veſted with the executive power of the
' State, to ſue every criminal, without the concurrence, or
' even contrary to the will of the party injured: But his
' power of proſecuting criminals, is extended no further
' than the *publica vindicta*, or the ſatisfaction of public
' juſtice, is concerned. The private party has a right of
' action againſt the offender, for reparation of the injury:
' In which action, however, though it be purſued merely *ad*
' *civilem effectum*, the King's Advocate muſt concur; becauſe
' it ariſes from a criminal cauſe, and a ſum is, by the decree
' proceeding upon it, awarded to the Purſuer in name of
' damage, as a ſort of compenſation for the wrong done to
' him proportioned to the enormity of the offence, though
' he ſhould have in fact ſuffered no pecuniary loſs." P. 701.

When any point of Law, whether relating to civil or criminal juriſprudence, is generally underſtood, precedents are ſeldom to be found; for it is rare that any perſon ventures to obtrude his own opinion againſt a received doctrine. Such precedents, however, as are to be diſcovered in the proceedings of this Court, are perfectly agreeable to the doctrine laid down by Mr Erſkine.

The caſe of Mr Lockhart of Lee, againſt certain rioters in Lanark, will be freſh in your Lordſhips remembrance. Mr Lockhart had granted a preſentation to the Church of La-

nark,

nark, of which he underſtood himſelf to be the Patron, in favour of Mr Robert Dick: But an ill-grounded prejudice having been entertained againſt the preſentee, by a number of the inhabitants of that town, his ſettlement was obſtructed by force and violence. The clergymen appointed to take the previous meaſures, were aſſaulted when endeavouring to enter the town, and obliged to retire *re infecta*; and although unuſual, it became neceſſary to ordain Mr Dick at a very conſiderable diſtance from the pariſh. Even after his ordination, all acceſs to the church was denied to him, until the aid of a military force was obtained; and for many months he was obliged to perform the ſacred duties of his office, in ſtables and barns, in different corners of the pariſh. This certainly called aloud for public animadverſion; and a criminal proſecution was brought againſt them before this Court, at the inſtance of the Patron, and of John Lockhart of Cleghorn, and Allan Lockhart younger of Cleghorn, heritors of the pariſh, for themſelves, and in name and behalf of the other heritors, elders, and chriſtian people. An objection was, however, ſtated to their title to purſue; and your Lordſhips, after hearing Counſel, and adviſing Informations, made a juſt and well-founded diſtinction. It was impoſſible to maintain, that a riot obſtructing the ſettlement of Mr Lockhart's preſentee, did not affect him directly in his goods or property, without contending, in the face of Law, That a patronage, or the power of preſenting to the cure of a pariſh, was not a right of property; and your Lordſhips accordingly ſuſtained that Gentleman's title. But although the other two heritors who joined in the proſecution, had certainly an *intereſt* that they ſhould be permitted to attend public worſhip in the pariſh-church, and to receive every benefit they could derive from the inſtructions and diſcourſes of a man whom they deſervedly eſteemed, and conſidered to have been legally appointed their Paſtor and Spiritual Guide; yet as that intereſt was not peculiar to them,

or

or diſtinct from that of every other pariſhioner; and as they were unable to ſhow that they had been hurt by the proceedings of the rioters, either in their perſons, their fame, their goods, or their eſtate, your Lordſhips found, that they had no title to proſecute, and ſuſtained the objection in ſo far as it ſtruck at them.

The Proſecutor ſeemed inclined to lay hold of this caſe as favourable to his plea; and has accordingly been pleaſed to aſk, What condeſcendence of damage Mr Lockhart of Lee could have exhibited in a civil action?—But it is unneceſſary for the Pannel to obſerve, That the rule for which he contends, and in the ſequel is to illuſtrate, does not tend to confine the right of private proſecution to caſes where the Proſecutor can compare the damage he has ſuſtained with a certain ſum of money. That were indeed to put an end, in many caſes, to all claim for a *ſolatium*; and it would be in vain for a man who had got a box on the ear, whoſe noſe had been twiſted, or whoſe breech had been kick'd, to complain either before a Civil or a Criminal Court. But although Mr Lockhart of Lee might not be able to tax the damage done to him, by the obſtruction given to his preſentee, at a certain determined ſum; yet it will not be diſputed, that he muſt have been entitled to have claimed damages in a civil action, from thoſe by whom an interruption had been created to the free exerciſe of the property that was veſted in him.—And here it is that an eſſential difference ariſes between that caſe and the preſent; as it is abſolutely impoſſible for the Proſecutor to ſhow, that he has any right or title whatever to bring an action of damages before a Civil Court, againſt the Pannel, on account of his conduct at the laſt Election for the County of Moray.

In 1767, a proſecution was brought in the name of Robert Robb, firſt Magiſtrate of the Burgh of Weſter Anſtruther, with concourſe of his Majeſty's Advocate, againſt Gabriel Halliday ſchoolmaſter in Weſter Anſtruther, as having

ing been guilty of Perjury, when making oath as a witneſs in a complaint depending before the Court of Seſſion, for ſetting aſide the annual election of Magiſtrates and Counſellors that had taken place in that Borough at Michaelmas 1765. It ſhould ſeem, that the Pannel did not chooſe to ſeparate his objections to the Proſecutor's title, from the objections he likewiſe thought himſelf entitled to make to the relevancy of the Criminal Letters. He therefore pleaded Not guilty, and referred his further defence to his Counſel, who accordingly objected, 1*mo*, That Robb had no title to proſecute, becauſe he had no intereſt; it not having been alledged in the charge, that he had ſuffered any loſs in his perſon, character, or goods, by the oath in queſtion: 2*do*, That the Libel was laid on a wrong Statute: 3*tio*, That it did not charge the Pannel with emitting falſehoods upon oath, wilfully, or knowing them to be ſuch: 4*to*, That, from the manner in which the Libel was laid, and from the liſt of witneſſes, it evidently appeared that the Proſecutor meant to prove the crime of Perjury by parole teſtimony, which was ſaid to be incompetent: 5*to*, That no proper deſcription was given, of a variety of perſons mentioned in the Libel: And, 6*to*, That it was improper to bring the Pannel to trial in the Court of Juſticiary, as the Judges of the Civil Court, before whom the oath was emitted, might, and would have determined, whether or not he was guilty in an incidental manner; and, from their knowledge of the caſe, muſt have been better able to judge of that queſtion than any Jury poſſibly could be.—Theſe objections were fully treated, both by the Counſel at the Bar, and in Informations; and although the irrelevancy of the Criminal Letters, which alone was ſufficient to put an end to the proſecution, rendered it unneceſſary for the Court to give a particular judgment upon the Proſecutor's title, eſpecially after the Pannel had pleaded to the charge; yet it appears from a report of that caſe, given to the Public by the Learned Gentleman who draws the Information for the preſent

preſent Proſecutor, to have been the opinion of the Court, That Mr Robb had not a ſufficient intereſt to entitle him to carry on the action in his own name as a private party. The Learned Gentleman's words are:—'The Judges were all 'of opinion, there was nothing in the objection, that the 'Libel was laid on a wrong Statute, becauſe Perjury is a 'crime at Common Law; but as the eſſence of the crime 'was not charged, *viz.* that he knew what he ſwore was 'falſe; as the Proſecutor could not qualify any *proper intereſt*; 'and as the proceedings before the Court of Seſſion were not 'produced, they diſmiſſed the Libel.'

The caſe of Mr Dempſter, who was proſecuted for Bribery at the ſuit of Robert Geddie *jun.* merchant in Cupar of Fife, and Mr Robert M'Intoſh Advocate, is alſo well known to your Lordſhips. There, as in the caſe of Halliday, the objection to the title of the Proſecutors, and the exceptions taken to the relevancy of the Libel, were blended together; and a general interlocutor was pronounced, finding certain parts of the Libel too vague and uncertain to be made the foundation of remitting the Pannel to the knowledge of an Aſſize; and then proceeding in the following words: 'And 'as to the remaining articles of the Libel, reſpecting the Pan-'nel's attempts to corrupt James Morres, James Thomſon, 'John Smith, James Campbell, and David Preſton; in reſ-'pect it is not charged, that theſe attempts were effectual, 'or that any corrupt bargain was concluded betwixt the 'the Pannel and all or any of theſe perſons, or that they, 'or any of them, voted in the ſaid election of Magiſtrates 'and Counſellors, or in the election of the Commiſſioner 'or Delegate of ſaid burgh, in oppoſition to the intereſt of 'the ſaid Complainers, find, That they have no proper title 'to bring this proſecution againſt the Pannel upon the fact 'ſo charged, the ſaid proſecution being only with concourſe, 'and not at the inſtance of his Majeſty's Advocate; and 'therefore diſmiſs the ſaid Criminal Libel, and the Pannel 'from the Bar.'

The

The Counſel for the Proſecutor did indeed endeavour to turn this interlocutor in favour of their plea, by ſuppoſing it to imply, that if the attempts to corrupt the five perſons mentioned in the latter part of it, had been carried into compleat execution, and the Criminal Letters had charged, that they had voted in oppoſition to the intereſt of Meſſrs Geddie and M'Intoſh, theſe Gentlemen would have had a title to proſecute.—This, however, the Pannel can by no means admit. It was unneceſſary for the Court to go further than the nature of the caſe required, or to pronounce an interlocutor upon abſtract points, which did not ſtrictly apply to the queſtion directly before them. But if the opinions of the Judges, which have been given to the Public by the Learned Gentleman who has likewiſe reported that caſe, are fairly ſtated by him, it ſhould ſeem to have been laid down by ſeveral of them, that neither Mr Geddie, nor Mr M'Intoſh, would have had a title to proſecute, even although they had charged, in direct terms, that the Bribery had been compleated, and that the perſons ſo bribed had voted againſt them.

The Pannel comes now to mention another caſe, which, although it produced no deciſion upon the point now at iſſue, yet will ſerve to ſhow it to have been the general underſtanding of men of good ſenſe, and even of Great Lawyers, That a private party, although a Candidate to repreſent a diſtrict of boroughs in Parliament, was not entitled to bring a criminal proſecution on account of Bribery committed in one of theſe boroughs.

A Complaint having been brought by John M'Kenzie of Brae, and two other Counſellors of the borough of Dingwall, for ſetting aſide the election of Magiſtrates and Counſellors made by the majority at Michaelmas 1758, and for having it found, that the perſons voted for by the minority were duly elected, a Proof was allowed by the Court of Seſſion to both Parties; and upon adviſing that Proof, the

Court

Court found, ‘ That the election made at Michaelmas 1758 Aug. 7. 1759.
‘ by the perſons complained on, was brought about by
‘ means of bribery and corruption; and therefore found the
‘ ſame void and null, and reduced, decerned, and declared
‘ accordingly: But refuſed to declare the perſons voted for
‘ by the Complainers, to be legally elected Magiſtrates of
‘ the ſaid borough of Dingwall; and found Colonel John
‘ Scott, Kenneth Bain of Tulloch, Kenneth M‘Kenzie, and
‘ Andrew Robertſon, conjunctly and ſeverally liable in the
‘ full coſts of ſuit.’

On the next day, a Petition was preferred by the Complainers, praying the Court to find Colonel Scott, and the other three perſons mentioned in the interlocutor, liable to the forfeitures and diſqualifications introduced by the Act of the 2d of his late Majeſty, intituled, ‘ An Act for the ‘ more effectually preventing Bribery and Corruption.’ And a doubt having been ſtarted, of the competency of entering upon that buſineſs under a ſummary complaint, a ſupplementary action of declarator was brought by the Complainers, with the concourſe of his Majeſty’s Advocate; by which, after ſpecifying the various acts of bribery and corruption alledged to have been proved in the courſe of the complaint, they concluded, That the four Gentlemen above mentioned, and four more, ‘ all of them actors and aſſoci-
‘ ates in this ſcene of corruption, had thereby incurred the
‘ penalties and diſabilities contained in the foreſaid Act of
‘ the 2d of his late Majeſty; or at leaſt, upon the Common
‘ Law of this realm, they had, by their ſaid offences, forfeit-
‘ ed and loſt their right of burgeſsſhip, and ſhould be diſ-
‘ abled from electing, or being elected into truſt, office, or
‘ franchiſe in the ſaid borough; and that they ſhould be
‘ fined in the ſum of L. 500 Sterl. each for their ſaid offence,
‘ and otherways puniſhed, for the ſake of public example.’

The Defenders objected both to the competency of the action, and to the title of the Proſecutors; and the Court, after a hearing in preſence, and adviſing Informations,

Jan. 13. 1762. found ‘ the action not competent before this Court, and ‘ therefore dismissed the same.’ And their judgment, which proceeded chiefly on its being a fundamental part of the Constitution to preserve the jurisdiction of the Civil and Mar. 14. 1763. Criminal Courts separate and distinct, was affirmed by the House of Peers.

It is well known, that although these proceedings were in the name of John M‘Kenzie of Brae and others, yet they were in reality carried on by Sir John Gordon of Invergordon, who stood Candidate for that district of Boroughs in opposition to Colonel Scott, and had in that respect a strong interest to get the Colonel disfranchised, and convicted of Bribery.—But as no procedure could be had under the Statute which limits the prosecutions to two years after the incapacity, disability, forfeiture, or penalty thereby imposed, shall be incurred, and does not expressly apply to Bribery committed on account of an election of Magistrates and Counsellors of a borough; no other resource was left to him, than to bring a criminal action before your Lordships at Common Law: And that plan would most undoubtedly have been followed out with spirit, if Sir John had got any encouragement from his Counsel, who were of the most eminent then at the Bar, that an action of that sort could be maintained, either in the names of John M‘Kenzie of Brae, and the other Counsellors of the Borough in which the crime was said to have been committed, or in his own name as a Candidate to represent that Borough, and the others of the district, in Parliament.—Thus situated, he found himself reduced to the necessity of applying to his Majesty's Advocate, to give his instance: But to this application he received the following answer in writing: ‘ I will not prosti-
‘ tute my office, to serve the purpose of private resentment.
‘ When the Criminal Libel was brought in the Court of
‘ Session, recently after the crime was committed, the Pur-
‘ suers, by advice of their Counsel, asked no more than
‘ the concourse of the King's Advocate for the time. That

‘ being

'being ſufficient for all the purpoſes of private and public 'reparation at this diſtance of time, I will not adopt the ac- 'tion at my own inſtance. I will give my concourſe to any 'Criminal Libel brought by a party having intereſt to pur- 'ſue.'—This, however, did not ſatisfy Sir John; for, after making another requiſition to the Lord Advocate, to which he received only a verbal anſwer, he endeavoured to obtain, by the authority of this Court, what he had been officially refuſed on the part of the Public Proſecutor; and accordingly preferred a Petition to your Lordſhips, praying the Court to find, That his Majeſty's Advocate had done wrong in refuſing his inſtance to the proſecution demanded; and, in conſequence thereof, to make ſuch an order upon him as to your Lordſhips ſhould ſeem juſt. But the deſire of this Petition was refuſed, and there the matter reſted; Sir John, though known to be of a diſpoſition to ſpare no expence in carrying a point he had ſet his heart upon, being too well adviſed to think of commencing a proſecution for Bribery before the Criminal Court, at Common Law, either in his own name, or in the name of his friends, John M'Kenzie of Brae, and the other Counſellors of the Borough of Dingwall.

It was obſerved upon this caſe, by the Proſecutor's Counſel, that Sir John Gordon, and his adviſers, might well have doubted of Bribery being a crime at Common Law, eſpecially after the Statutes paſſed for reſtraining it; but that Perjury never was, or could be doubted to be, a crime at Common Law.—This, however, will not paſs with your Lordſhips. Although particular ſorts of Bribery have been made the object of Statutes, and certain penalties and diſabilities have been introduced by theſe Statutes, no Lawyer ever could entertain a doubt of its being a crime at Common Law, eſpecially when of that ſort as not to fall directly under the Statutes. That doctrine was indeed broached in the caſe of Mr Dempſter; but it was juſtly held in the moſt ſovereign contempt.

Corrupt

Corrupt and Wilful Perjury is not only a crime of an atrocious nature, and, as ſuch, deſerving the particular attention of the Public Proſecutor—but is alſo often attended with the moſt prejudicial conſequences to individuals. The Pannel may therefore ſafely admit, that in particular caſes, it may be made the ſubject of criminal proſecution at the ſuit of a private party, even altho' the King's Advocate ſhall (as he has done in this caſe, for reaſons which certainly appeared ſatisfactory to his own mind) refuſe his inſtance. But ſtill, as in other crimes, ſuch private party muſt be able to ſhow, that the crime was directed againſt him, and that he was hurt by it; or at leaſt, that the perſon accuſed intended to hurt him in his perſon, in his fame, or in his goods or eſtate; for, unleſs he can qualify that to be the caſe, he can have no peculiar intereſt: And to allow perſons in that ſituation to proſecute for Perjury, would be in effect to introduce popular proſecutions, which are never permitted in this country, but in caſes where they are allowed by Statute.

The only characters under which the Proſecutor attempted to maintain his right to carry on the preſent action, were, his being a Freeholder of the County of Moray, and his having been a Candidate at the laſt Election to repreſent that County in the preſent Parliament. How far he is at liberty, *in hoc ſtatu*, to aſſume either of theſe characters, ſhall be conſidered in the ſequel. But at preſent, the queſtion ſhall be diſcuſſed upon the ſuppoſition that the Criminal Letters had explicitly, and in the proper place, born that both theſe characters belonged to him; and had alſo particularly ſet forth, that the Pannel, after taking the Truſt Oath, had voted againſt him.

To begin, therefore, with the Proſecutor's intereſt in reſpect of his being a Freeholder, the Pannel muſt acknowledge, that he is at a loſs to diſcover how that circumſtance can entitle him to become the Public Avenger, or to proſecute

ſecute *ad vindictam publicam.* The only conſequence of the Pannel's having taken that oath is, that he muſt continue upon the Roll, and ſtill enjoy the privileges of a Freeholder. But how his doing ſo can hurt either Mr Cumming of Altyre, or any of the other Freeholders, in their perſons, in their fame, or in their goods, property, or eſtate, it is not eaſy to perceive. It ſurely will not be pretended, that the Proſecutor is in the ſmalleſt degree hurt in his perſon or his fame, by the crime here ſuppoſed to have been committed by the Pannel; and there is equally little foundation for alledging, that he has been hurt in his goods, property, or eſtate of any kind. His character as a Freeholder, and all the conſequential privileges he can claim as ſuch, remain as entire to him as if the Pannel had never been admitted to the Roll, or had refuſed to take the Oath of Truſt and Poſſeſſion, when put to him at the laſt General Election: And nothing done by him on that occaſion, had the ſmalleſt tendency to encroach upon the privileges or rights of any perſon whatever.

It may perhaps be true, that a Freeholder's political weight and influence are greater in a county where there are few Electors, than in another county where they conſiſt of double or triple the number; and on that account it was maintained, That every Freeholder muſt have an intereſt, and therefore a title, to proſecute another for Perjury in taking the oath, in reſpect that the Law has ſaid, that perſons convicted of that crime, ſhall not be allowed to vote in the Election of a Member of Parliament. This is, however, an intereſt too remote, and of too inſignificant a nature, to permit a private individual to become the avenger of public crimes; and, were it to be ſuſtained, would lead to the introduction of the next thing in the world to popular actions.—Upon the ſame principle it may be argued, That one Freeholder has a title to proſecute another, for Perjury committed in a private cauſe, altogether independent of Election-matters, and in which he was in no ſhape intereſted,—for murder, robbery, rape, or any other crime

whatever, which, if proved, may be puniſhed by death or baniſhment,—as by that means the perſon accuſed will be diſabled from exerciſing the privileges of an Elector, and the accuſer's own freehold-qualification will of courſe become more valuable and important. Nor will the matter reſt here—For, upon the ſame principle, every member of a ſubordinate corporation within a borough, muſt be entitled to proſecute another member of the ſame corporation for any crime whatever; becauſe the conſequence of a conviction of the perſon accuſed, muſt be to enhance the value of the privileges which the proſecutor enjoys, by having a voice, either in the management of the corporation's particular concerns, or in the political government of the Borough to which it belongs.

Many other caſes might be figured, to ſhow the impropriety of liſtening to an intereſt of this ſort; and altho' ſome of them may appear rather ludicrous, yet they will not on that account be the leſs ſtriking or concluſive in favour of the objection that is now made to the Proſecutor's title, as reſted upon his being a Freeholder. Every Heritor has a right to vote in the election of a ſchoolmaſter; and this right may be ſaid to be more or leſs valuable, in proportion to the number of Heritors within the pariſh. But your Lordſhips would, it is believed, be much aſtoniſhed, to ſee an intereſt of that ſort ſet up by one Heritor, as a title for proſecuting another, for a crime, for which, if guilty, he was liable to the puniſhment of death or baniſhment. The caſes are, however, perfectly ſimilar; and if ſuch remote intereſts were to be allowed, the Pannel ſhould not be ſurpriſed to ſee proſecutions brought by individuals of particular profeſſions, even of a learned one, in the view of getting others of the ſame profeſſion removed, and by that means rendering themſelves more conſpicuous, and bettering their income.

It is no doubt an object to a Freeholder, that the Candidate whom he wiſhes to repreſent the County, ſhall be elected;

elected; but if this be ſufficient to entitle him to proſecute another Freeholder for having committed Perjury by taking the Oath of Truſt and Poſſeſſion, in the view of keeping himſelf upon the Roll, and giving his voice for another Candidate, it muſt, upon the ſame principle, be equally competent to each Freeholder, to proſecute a perſon, who had by force or violence detained or kept from the election, another Elector in the ſame intereſt with himſelf; or who had ſtolen the papers or title-deeds belonging to a Gentleman who intended to get himſelf put on the Roll, in the view of voting for the ſame Candidate.

The Legiſlature has deviſed ſundry oaths, for the purpoſe of preſerving the purity of Elections. The Oath of Bribery may be put to Freeholders; and thoſe who ſhall ſwear it falſely, are declared guilty of wilful and corrupt Perjury. A ſimilar oath muſt be taken, when required, by every Magiſtrate and Counſellor of a Borough, at the election of a Delegate; and thoſe who take it falſely, become likewiſe guilty of Perjury.— But the Pannel humbly apprehends, that a proſecution of that Crime could not be liſtened to by your Lordſhips, if brought upon an occaſion of that ſort, only in the name of an individual Freeholder, or in that of a ſingle Magiſtrate or Counſellor of a Borough. Their intereſt muſt, however, be admitted to be equal to that of a Freeholder, who takes it upon him to proſecute a perſon who ſtands upon the Roll, as guilty of Perjury, in taking the Oath of Truſt and Poſſeſſion.

It is no doubt true, that the object of the Statute libelled on, was to preſerve the purity of the Roll of Electors, and to prevent thoſe who had only nominal and fictitious qualifications, from enjoying the privileges of Freeholders; and that, with this view, it allows any Freeholder upon the Roll to put the Oath of Truſt and Poſſeſſion; and declares, that the name of every perſon who refuſes to take it, ſhall forthwith be erazed; and that every one who preſumes wilfully and falſely to ſwear and ſubſcribe it, and ſhall be thereof lawfully convicted,

victed, ſhall incur the pains and puniſhment of Perjury. But there is not a ſingle word in the Statute, to countenance the idea, that the Legiſlature intended to empower either the Freeholder who puts the oath, or any other, to bring a Criminal Proſecution againſt the perſon who takes it. Every one who is in the leaſt degree acquainted with the Statutes relative to Elections, muſt have obſerved, that the Legiſlature has been peculiarly attentive to point out, in clear and explicit terms, by whom the penalties and diſqualifications introduced in many different caſes by theſe Statutes, may be ſued for. In ſome caſes, they are given to individuals of a certain deſcription only; and in others, to every perſon who ſhall ſue for them. It is therefore natural to ſuppoſe, that if it had been in the contemplation of the Legiſlature to allow every Freeholder to proſecute thoſe who commit Perjury, by wilfully and falſely taking and ſubſcribing the Oath of Truſt and Poſſeſſion, the Statute would have ſaid ſo in clear and poſitive terms; and would not have left it a matter of doubt, or a ſubject of argument, by declaring, that the guilty perſon ſhall be proſecuted *according to the laws and forms in uſe in Scotland.* The Legiſlature muſt indeed have been called upon in a particular manner to do ſo, if, as the Proſecutor ſays, it muſt have been foreſeen that the King's Advocate would never proſecute for ſuch an offence; or that by his doing ſo, the minds of men were to be irritated and inflamed, both againſt himſelf, and againſt Government.

Neither will the Proſecutor's title be enlarged or amended, by his aſſuming likewiſe the character of a Candidate to repreſent the County in Parliament; for, even ſuppoſing that he had actually loſt his election by the Pannel's vote, ſtill it muſt have been impoſſible for him to alledge, that he had been hurt, either in his perſon, in his fame, or in his goods, property, or eſtate. It was accordingly well obſerved during the courſe of the pleading, that his perſon muſt be in a better plight, by being allowed to live quietly, and at eaſe at home, than by being ſtewed

days

days and nights together, in the Houſe of Commons: that although a character may be acquired in that Houſe, yet there it may likewiſe be leſſened, or loſt; and that in point of fortune, the only advantage he could receive, was the getting his letters tranſmitted to him free of poſtage, which would in all probability be greatly overbalanced by the expence of travelling to and from London, and of reſiding there during the ſitting of Parliament.

The Pannel is far from diſputing that it is a deſirable object to a good and worthy mind, to be a Member of the Legiſlative Body, and to have an opportunity of watching over the rights and intereſts of the Nation. It muſt, however, be admitted, that, in the language of the Law, and of the Conſtitution, attendance in Parliament is conſidered not as a privilege, but as a burden or ſervice. But whether it be viewed in the one light, or in the other, the Pannel humbly apprehends, that no ſuch intereſt is acquired by being a Candidate, as to create a title in a perſon to maintain a criminal proſecution, which otherwiſe would not be competent to him. No perſon can either be hurt or injured, in a legal ſenſe, either in his perſon, or in his fame, or goods, without having it in his power to bring a civil action for reparation of his loſs, or for a *ſolatium;* and the ſame intereſt which gives him that title, likewiſe authoriſes him to purſue criminally *ad vindictam publicam.* The Pannel will therefore beg leave to aſk, Whether, in the event of the Proſecutor's having loſt his election by his voice, in conſequence of his taking the Oath of Truſt and Poſſeſſion, he could have brought an action of damages againſt him in a Civil Court? The Pannel humbly apprehends, that no ſuch action could poſſibly lie. But thence it neceſſarily follows, that a criminal action muſt be equally incompetent to the Proſecutor.

Indeed, the more this queſtion is conſidered, the more clearly will it appear, that wherever the intereſt of a private party to purſue criminally is admitted, the ſame intereſt

muſt warrant him to demand reparation in a Civil Court, if neceſſary, for the loſs he has ſuſtained, or to inſiſt for a *ſolatium* on account of the injury he has received. In the caſe of Murder, there is an aſſythment due :—In the caſe of a Rape, an action for damages, and a *ſolatium*, is competent :—In Theft, a civil claim lies for reſtitution of the ſtolen goods ; and the like is to be obſerved in every crime that is directed againſt individuals.—Here, then, is a clear and invariable rule, by which this matter may be at all times eaſily explicated, and the boundaries properly defined betwixt the ſalutary maxim, That there ſhould be no popular actions,—and the other juſt and natural one, That every perſon having a legal intereſt, ought to be allowed to maintain criminal ſuits:—But, to depart from that rule, and to ſuſtain conſequential, remote, or imaginary intereſt, would only tend to introduce much improper ſtrife and contention, and to make way for arbitrary proceedings, without any neceſſity ; the general good of the State being ſufficiently ſecured by the appointment of a high and reſpectable Officer, to bring criminals of every rank and degree to due and condign puniſhment. Men are apt to entertain wilder notions in criminal, than in civil matters : their paſſions are heated, and ſtrongly excited ; they are of courſe apt to be blinded, and to leave reaſon behind :—It is therefore highly eſſential to the peace and good order of Society, that criminal proſecutions at the ſuit of private parties, be confined to the caſe of their being materially and directly injured ; and that in all others, although perhaps of a more deſtructive nature to Society in general, and alſo tending conſequentially to affect individuals in ſome degree, the power of proſecuting be veſted in the *calumniator publicus* alone.

The Pannel will beg leave to put the caſe, That a Candidate for a County has loſt his election by the vote of a perſon who got upon the Roll, in conſequence of his having forged a diſpoſition, containing an aſſignment to the precept

cept of a charter, and of his having taken infeftment upon that precept. In ſuch a caſe, the Candidate will be entitled to ſet aſide that perſon's vote, if the merits of the election are brought before a Committee of the Houſe of Commons. But it will not be pretended, that he will likewiſe be entitled to bring an action for damages, or for recovering the expence of his Petition, againſt ſuch a perſon; and of courſe it muſt be equally incompetent to him, to proſecute that perſon criminally for Forgery. If ſuch a latitude were to be allowed, even a claimant, whoſe claim for enrolment has been rejected by the vote of a perſon in theſe circumſtances, or by that of a Freeholder, who willfully and falſely took the Oath of Truſt and Poſſeſſion, would, upon the ſame principle, be entitled to maintain a Criminal Proſecution for Forgery or Perjury.

The Proſecutor was pleaſed to refer to a deciſion of the Court of Seſſion, in the queſtion between M'Lean of Lochbuie, and M'Neil of Collonſay; where it was found relevant to diminiſh the price of lands, that they did not entitle to a vote, when it was bargained that they ſhould do ſo. But the Pannel is at a loſs to conceive the application of that caſe to the preſent queſtion. He is not under the neceſſity of diſputing, that the right of electing, or being elected into Parliament, is in ſome degree of a patrimonial nature: on the contrary, he may ſafely admit, that if by taking the Oath of Truſt and Poſſeſſion, he had been to deprive the Proſecutor of his freehold, he might have been liable to an action of damages on that account. But it is plain, that by taking that oath, he made no encroachment whatever, either upon the Proſecutor's right to vote, or upon his capability to be elected, both of which remain to this day as entire as ever.

What has been juſt now obſerved, will likewiſe ſhow, that no argument in favour of the proſecution can be drawn from the caſe of Aſhby againſt the Conſtables of the the Town of Ayleſbury. Aſhby had been wrongfully prevented from the exerciſe of his freehold, and had therefore

a good ground for demanding damages. But it is a remarkable circumſtance, that in the pleadings for the Defendants, two caſes were referred to, in the one of which it was adjudged, that a Candidate could not bring an action againſt a Sheriff, for a double return; and in the other, that no action lay at Common Law, for a falſe return of a Member to ſit in Parliament. It was accordingly well obſerved with reſpect to the laſt of theſe caſes, That 'the Candidate 'has a proper remedy to recover his place, from which he 'is excluded by the falſe return. The right of election is 'cogniſable in the Houſe of Commons:—there he will re-'cover his ſeat in Parliament, which is what the Law has 'the principal regard to; and there is no reaſon he ſhould 'have another remedy elſewhere.'

It was ſaid for the Proſecutor, That if *omnis definitio in jure periculoſa*, it muſt be ſtill more hazardous to attempt to ſqueeze a very extenſive and complicated doctrine, into an aphoriſm of a few words: And that if by damage, be meant loſs; if by perſon, be meant the body; by eſtate, property that may be brought to market; and by reputation, good name or character;—the rule of Law contended for by the Pannel, muſt be palpably falſe. Several caſes were accordingly put, to ſhow that numberleſs proſecutions muſt be competent, altho' no damage can be qualified; and ſometimes even altho' a gain, and not a loſs, has been occaſioned to the proſecutor by the crime.—And it was further maintained, That in order to give a reaſonable conſtruction to the authorities founded on by the Pannel, the words damage, perſon, eſtate, and reputation, muſt be liberally interpreted, ſo as to comprehend every injury done, not only to the body and limbs, but to the ſtate and diſtinction of a man in civil ſociety; and every encroachment, not only upon property that can be eſtimated in money, but upon all rights and privileges, honorary as well as patrimonial.

This obſervation, however, when thoroughly conſidered, will be found only a vain attempt to rear up a plauſible doctrine,

doctrine, by putting, on the one hand, a more narrow interpretation upon the rule of Law, which limits the power of criminal profecution to ſuch private parties as have ſuffered damage in their perſon, reputation, or eſtate, than the Pannel has any occaſion to contend for; and by extending, on the other hand, the meaning of the words *perſon* and *property*, beyond what, in ſound conſtruction, and in a legal acceptation, they can juſtly receive.

The Pannel may ſafely admit, that one may be hurt in his perſon, not only by a direct attack upon his body, but alſo by being affronted, or expoſed to ridicule. This may be done in many ways; and the Pannel will readily agree, that if he had committed a real injury againſt the Proſecutor in the way mentioned by Sir George Mackenzie, ſuch as by giving him medicines to affront him, or by wearing in contempt what belonged to him as a mark of honour, there might have been room for a profecution. In like manner, a criminal profecution might have been competent, if the crime laid to the Pannel's charge had tended to deprive the profecutor of his particular ſtate and diſtinction in civil ſociety as a Freeholder. In both theſe caſes, there might have been room for contending, that the Proſecutor had been hurt in his perſon.—But it ſurely cannot be ſeriouſly maintained, That any attack has been made either upon his perſon, or upon that ſtate or diſtinction he is entitled to enjoy in ſociety, by the Pannel's having taken the Oath of Truſt and Poſſeſſion, in the view of preventing his own name from being eraſed out of the Freeholders Roll.

The firſt caſe put by the Proſecutor, was that of an heir who is allowed to proſecute for the murder of his predeceſſor, altho', inſtead of being a ſufferer by the crime, an opulent ſucceſſion ſhould devolve upon him in conſequence of it. But to this a ſufficient anſwer has already been given. The Law does not inquire, in ſuch caſes, whether the ſucceſſion be great or ſmall, *lucroſa* or *damnoſa*; nor does it ſuppoſe that the loſs of a near relation can be compenſated in

that way. The heir is alſo underſtood, in the eye of Law, to be *eadem perſona cum defuncto*; and as the defunct can no longer proſecute himſelf, there is nothing unnatural, but, on the contrary, it is moſt conſiſtent with reaſon and good policy, to allow the heir to demand public vengeance for ſo foul and atrocious a crime.

The caſe of a witneſs ſwearing falſely when examined in a claim for a title of honour, and by his perjury cauſing it to be diſmiſſed, is likewiſe of a very different nature from that which is now under your Lordſhips conſideration; for there the tendency of the crime is both to wound the accuſer in his perſon, and to deprive him of a valuable and hereditary right, not of a temporary or accidental kind, but inſeparably connected with his rank and ſtation in life, and to be tranſmitted from him, upon his deceaſe, to his heirs and ſucceſſors.

A man ſuffers likewiſe in his property, by every encroachment made upon it, whether he is ultimately a loſer or not; *Unuſquiſque eſt moderator et arbiter rei ſuæ:* And it were ridiculous to ſuppoſe, that a perſon could not be proſecuted for breaking down his neighbour's fences, for the purpoſe of manuring his ground, provided he could ſhow that his neighbour was a gainer by that operation.—To admit of ſuch an apology, would lead to endleſs confuſion and litigation. And it might with equal reaſon be maintained, that one might, with impunity, make the moſt material alteration, in his neighbour's abſence, upon his houſe or gardens, provided he could ſatisfy a Judge or a Jury, that his operations, inſtead of being hurtful to the owner, were real improvements on his property.

The ſtory with which your Lordſhips were amuſed reſpecting the judgment pronounced by Cyrus, is of a piece. The little boy had a right of property in his long coat, and the tall boy had no buſineſs to tell him that a ſhort one would ſuit him as well; he was accordingly guilty of robbery, in ſtripping him: And the Proſecutor's Counſel obſerves juſtly,

juſtly, that very little experience and reflection muſt be ſufficient to point out the defect and dangerous tendency of that levelling principle upon which the judgment of Cyrus proceeded.

In ſhort it is clear, that in every one of theſe caſes, a civil action for damages, or a *ſolatium*, would lie. But it has already been ſhown, that no ſuch action can lie to the Proſecutor againſt the Pannel, on account of his being diſappointed, even by his means, of acquiring a Seat in Parliament.

The Proſecutor was indeed pleaſed to ſtate another caſe, as in oppoſition to the plea maintained by the Pannel, That no perſon can bring a criminal proſecution, without being likewiſe entitled to inſiſt in a civil action for recovering his loſs, or for damages, or a *ſolatium*. The caſe here alluded to, is that of a perſon who ſwears falſely that he owes nothing, when the truth of a debt is referred to his oath. The debt is by that means for ever extinguiſhed: But it is ſaid, that all Lawyers are agreed, that the falſe-ſwearer may be proſecuted for Perjury.

But, upon conſidering this caſe, the Pannel will, in the *firſt* place, be allowed to doubt whether a private party can in any caſe be allowed to proſecute even criminally for Perjury, when the oath is emitted in conſequence of his own reference; by which he judicially binds himſelf to hold what ſhall be ſworn by his antagoniſt, *pro veritate*. Sir George Mackenzie has taken particular notice of this queſtion: And altho' he does not carry the matter ſo far as ſome of the Doctors do, by denying the King's Advocate's right to proſecute for Perjury committed in that way; yet he ſeems to have been of opinion, that the right of proſecution is not competent to the private party:—'*Clarus*, *num.* 12. § *Perjurium*, 'is of opinion, that when any-thing is referred to oath 'judicially, that, *eo caſu*, the party who ſwears can never be 'challenged for Perjury, *ſed ſolum Deum habet ultorem*; which '*Boerius* doth alſo aſſert to be the common opinion, *Deciſ.*

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'305. And the reaſon which moves them to this, ſeems to 'be, that a party having made his antagoniſt abſolutely 'judge of his own cauſe, he has, as it were, ſubmitted to 'him, *et juramentum debet eſſe ultimum refugium.* And this ſeems 'to be the caſe decided, *per L. 2. c. de rebus credit. Reli-* '*gionem contemptam juramenti ſatis Deum habet ultorem, ſed majeſta-* '*tis crimen vel periculum corporis, et ſi per principis venerationem,* '*quodam calore fuerit perjuratum inferri non placet*; for, in the im- 'diately preceding Law, it is ſaid, That *cauſa jurejurando ex* '*conſenſu utriuſque partis delato deciſa, nec perjurii prætextu retractari* '*poteſt.* So that adding both Laws together, the ſenſe is, 'that when the cauſe is referred to any party's oath, it be- 'ing decided conform thereto, that deciſion can neither be 'retracted upon pretext of perjury, nor can the perjurer be 'corporally puniſhed. And this ſeems a much more rea- 'ſonable anſwer, than theſe many given by the Doctors: 'But yet I cannot aſſent to the concluſion itſelf, nor is it at 'all conform to our Law, nor perhaps to reaſon; for, Intereſt 'and Avarice are ſufficient baits to Perjury, tho' Impunity 'be not thereto added; and when the party defers an oath, 'he intends thereby to ſubmit finally to him to whom 'the ſamin is deferred; but not ſo but that if thereafter 'the ſwearer ſhall be found perjured, he may be ſtill chal- 'lenged; nor perhaps would have deferred the oath, if he 'had not concluded himſelf ſecure as to what ſhould be 'deponed, not only out of reſpect to religion, but likewiſe 'becauſe of the hazard of perjury: And ſeeing, in this caſe, 'there is *mendacium juramento affirmatum*, I do not ſee how it 'ſhould not be Perjury. *Is there any ground, why at leaſt his* '*Majeſty's Advocate ſhould not be allowed to purſue it? for the reaſon* '*which is urged for the ſpecialty in it, ceaſeth in him.*'

In the *next* place—Even ſuppoſing it competent to a party who makes a reference to oath, to proſecute for Perjury, that circumſtance can have no influence whatever upon the preſent queſtion.—A perſon who has loſt a juſt debt by the perjury

perjury of another, has ſuffered eſſentially in his property; and it ſhould ſeem to be no great ſtretch to allow him to proſecute *ad vindictam publicam*, altho', in reſpect of the judicial contract he entered into by the reference to oath, he is for ever precluded from demanding payment of that debt. The crime is alſo immediately and peculiarly directed againſt an individual; and with no other view, than unjuſtly to with-hold from him a part of his property: whereas the ſuppoſed crime of which the Pannel is now accuſed, was not directed either againſt the Proſecutor, or againſt any other Freeholder, or with a view to deprive them of any of their juſt rights. It is not indeed neceſſary that a private party ſhall ultimately ſuffer by a crime, to entitle him to proſecute the criminal perſon. —One who has been robbed of his money, or whoſe goods have been ſtole, may proſecute the robber or the thief, although the money or the goods be found in their poſſeſſion undiſpoſed of, and are to be reſtored to him after being produced in evidence in the trial. It is ſufficient that the crime was directed immediately againſt him, and that its object was to injure him in his property. But, in the preſent caſe, the Proſecutor cannot ſhow that the crime of Perjury, which the Pannel is accuſed of, was directly committed againſt him, or tended in the ſmalleſt degree to hurt him in his perſon or character, or in his property:—On the contrary, the Oath of Truſt and Poſſeſſion was taken by the Pannel, not with a view to affect the Proſecutor in any ſhape, but merely for the purpoſe of preventing his name from being erazed from the Roll of Freeholders, and of his being ſtill permitted to exerciſe the privileges of a Freeholder. The Proſecutor was not therefore hurt even as a Candidate, by the Pannel's taking that oath; and although he had qualified in his Libel, that the Pannel voted againſt him, (which he has not done), ſtill that could not have entitled him to proſecute the Pannel for a previous part of his conduct that had no particular relation to him; but was only

purſued in the view of protecting himſelf in the exerciſe of the privileges he had a right to enjoy, by being on the Freeholders Roll.

What has been juſt now obſerved, will likewiſe ſerve as an anſwer to another caſe that was put by the Proſecutor's Counſel, *viz.* That where a witneſs ſwears falſely upon oath, that a perſon was guilty of murder, theft, or any other crime, that perſon, although acquitted, will be entitled to proſecute the witneſs for Perjury; for there the crime is committed directly againſt the perſon accuſed, and with an intention to injure him moſt eſſentially in his perſon and his character, and even in his goods, which may be confiſcated upon his conviction; nay, what is more, he muſt ſtill, though acquitted, be hurt in his character by the falſe oath, until the ſtain brought by it upon him be removed, by convicting the witneſs of Perjury. But if it be perfectly clear, that a fact depoſed to by a witneſs is not at all material to the point in queſtion, the Pannel humbly apprehends, that the private party can have no title to proſecute; and this matter is ſo far carried in the Law of England, as to prevent a witneſs, in ſuch a predicament, from all proſecution whatever. Hawkins, accordingly, when treating of Perjury, expreſſes himſelf as follows:—'As to the ſeventh particular, *viz.* How far the thing 'ſworn ought to be material to the point in queſtion, it 'ſeemeth clear, that if the oath for which a man is indicted 'of Perjury, be wholly foreign from that purpoſe, or altogether immaterial, and neither any-way pertinent to the 'matter in queſtion, nor tending to aggravate or extenuate 'the damages, nor likely to induce the Jury to give a 'readier credit to the ſubſtantial part of the evidence, it 'cannot amount to Perjury, becauſe it is merely idle and 'inſignificant; as if upon a trial, in which the queſtion is, 'whether ſuch a one was *compos* or not? a witneſs introduces his evidence, by giving a hiſtory of a journey which

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'he took to ſee the party, and happens to ſwear falſely in 'relation to ſome of the circumſtances of the journey.' *Hawkins's Pleas of the Crown*, vol. I. p. 175.—And the ſame Author, after mentioning that the beſt rule for determining whether a matter in which Perjury is aſſigned can be puniſhable, is to conſider whether ſuch matter were wholly impertinent, idle, and inſignificant, or not, adds as follows, in the next page:—'But it is ſaid in *Siderfin*, ſpeak-'ing, as I ſuppoſe, of an anſwer in Chancery, that a man 'may be guilty of Perjury at the Common Law, by ſwear-'ing a thing not material. But ſurely this ought not to be 'underſtood in ſo great a latitude, as if it were meant that 'every falſity in ſuch an anſwer muſt needs be Perjury, 'however foreign, circumſtantial, and trivial the point where-'in it is aſſigned may be; which is directly contrary to what 'ſeems to be clearly taken for granted in other books: And 'therefore, perhaps, where it is ſaid that a man may be guilty 'of Perjury in a thing not material, no more may be meant 'but that he may be as well guilty thereof by anſwering to 'a matter not charged in the Bill, as by anſwering to the 'matters therein contained, which may alone be ſaid to be 'material; becauſe the defender is not obliged, in his an-'ſwer, to take notice of any-thing elſe:—Or elſe, perhaps, 'the meaning may be, that, in a proſecution for Perjury 'at Common law, ſetting forth a falſe oath in ſuch an an-'ſwer, relating to the thing ſaid to be in variance, the 'falſity ſhall be intended, *prima facie*, to have been ſome-'way material in the cauſe, unleſs the contrary be proved by 'the other ſide: whereas, in all proſecutions upon the Sta-'tute, it is neceſſary expreſsly to ſhow in what manner the 'falſe oath is material to the cauſe in queſtion; becauſe 'that Statute, extending only to ſuch Perjuries whereby 'ſome perſon is grieved, cannot maintain a proſecution, 'which does not bring the caſe within the purview of it, by 'ſhowing that the ſame one was grieved by the injury com-'plained of, which he could not be unleſs the thing ſworn

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'were ſome-way material. However, it ſeemeth to be 'clear, that a man may as well be guilty of Perjury by a 'falſe oath, tending to extenuate or aggravate the damages, 'as by an oath which is direct to the fact in iſſue."

Another caſe was put by the Counſel for the Proſecutor, *viz.* that of a forged letter written to the Freeholders of a County, informing them, That a particular Candidate was not to ſtand,—and of his opponent being, in conſequence thereof, elected: And it was ſaid, that, in ſuch a caſe, the diſappointed Candidate would undoubtedly be entitled to proſecute the forger, either criminally and capitally, if he choſe redreſs by puniſhment,—or for very high damages, if he choſe redreſs by a pecuniary reparation.

The caſe here ſuppoſed, is, however, very different from the preſent.—A perſon who takes it upon him to write falſe letters in the name of another, does thereby attempt to perſonate that other, and is at leaſt guilty of a fraudulent act towards him. But altho', on that account, it might perhaps be no great ſtretch to conſider him as liable to a proſecution for damages before a Civil Court, at the ſuit of him whom he ſo perſonates, that circumſtance would alone be ſufficient to diſcriminate a caſe of that ſort from the preſent, unleſs the Proſecutor ſhall be able to ſatisfy your Lordſhips, that he is likewiſe entitled to bring an action againſt the Pannel before a Civil Court, for the purpoſe of recovering damages from him, on account of his having taken the Truſt Oath at the meeting for election. At the ſame time, the Pannel can by no means admit, that, in the caſe here put, the diſappointed Candidate could bring a proſecution before your Lordſhips, againſt the author of the falſe letter, for the crime of forgery. Indeed it is ſcarcely poſſible to ſuppoſe, that ever ſuch a caſe can happen. A Candidate who can be outwitted by a trick of that ſort, muſt not only be himſelf the weakeſt of men, but muſt alſo be ſo peculiarly unfortunate as not to have a ſingle friend of common ſenſe in his intereſt.

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Notwithſtanding, therefore, all the caſes which have been put on the part of the Proſecutor, the Pannel humbly apprehends, That none of them do in the ſmalleſt degree impinge upon the rule laid down by him, that the right of proſecuting criminals *ad vindictam publicam*, muſt be limited to ſuch private parties alone, as can ſhow that the Criminal Acts of which they complain, were particularly directed againſt themſelves, and had a clear and immediate tendency to injure them in their perſon, their reputation, or their property, and to deprive them of a right of which they were then poſſeſſed. This rule is indeed founded upon the beſt of all authorities, *viz.* common ſenſe, ſound policy, the opinion of the Writers upon the Law, the general underſtanding of Lawyers, and the practice of this Court, ſo far as precedents appear; whereas on the other hand, the vague and comprehenſive title to proſecute, for which the other party contends, and under which he includes remote and conſequential intereſts, is ſupported by no authority whatever, might be productive of much abuſe, and in all probability would be attended with very prejudicial conſequences to the peace and good order of Society.

Under this branch of the argument, the Pannel will take the liberty further to obſerve, That even ſuppoſing the Proſecutor to have ſuffered a patrimonial loſs by not being elected, ſtill, before he can ſet up that as a ſufficient intereſt to entitle him to carry on the preſent action, he muſt be able to ſhow that he would have prevailed, if the Pannel had not taken the Oath of Truſt and Poſſeſſion. That, however, it is totally impoſſible for him to do, at leaſt *in hoc ſtatu*; for, although none of the parties can now judicially refer to evidence that is not before your Lordſhips, yet the Court has been hiſtorically informed, (and the truth of the ſtory will not be diſputed), that Lord Fife was elected by a majority of 24 to 8. Suppoſing, therefore, that the Pannel, and the two other Gentlemen againſt whom the Proſecutor has thought proper

to execute Criminal Letters, were all to acknowledge their having been guilty of Perjury in taking the Oath of Truſt and Poſſeſſion, ſtill there would remain a majority againſt him of 21 to 8; and it would be incumbent upon him to ſet aſide the votes of 14 of theſe 21, before he could get himſelf found to be duly elected. That, however, it is impoſſible for him to ſhow at preſent: He can only do ſo in the Proper Court. If after bringing the merits of the election before the Houſe of Commons, he ſhall be able to ſhow that he would have been ſucceſsful, if the Pannel, and the other two Gentlemen in ſimilar circumſtances with him, had not taken the Truſt Oath, he may then perhaps have ſome pretence for ſaying that he was injured by their having taken that oath: But until he do ſo, it is totally impoſſible for him to eſtabliſh that material fact.

It was ſaid for the Proſecutor, That if it be true that he can maintain no civil action for damages, on account of an injury done to either of the rights he founds upon, he ought the more readily to be indulged with the power of proſecuting for puniſhment; otherwiſe this abſurdity muſt be admitted, That for the moſt atrocious violation of the moſt valuable rights, a man ſhall have no remedy at all. But after what has been already ſtated on the part of the Pannel, it muſt be unneceſſary for him to take any ſerious notice of ſo very ſtrange a propoſition as this obſervation ſeems to involve. The reaſon why the Proſecutor can have no claim of damages, is, that he has not ſuffered, in the legal ſenſe of the word, by the crime which is laid to the Pannel's charge, his valuable right of a Freeholder being ſtill as entire as ever: And it were ſtrange, indeed, if a ſmaller, or a more remote intereſt, were to entitle one to bring a criminal proſecution, than what will give him a right of civil action. Beſides, the Proſecutor here keeps it out of view—that in order to obtain redreſs for the injury he ſuppoſes himſelf to have received as a Candidate, he has already preferred his Petition to the Houſe of Commons,

mons, where he will meet with full juſtice, whether the preſent proſecution ſhall be allowed to proceed or not. Indeed the convicting the Pannel of Perjury, could not give the Proſecutor the ſmalleſt aid before the Houſe of Commons; for, although the Law has declared, that no perſon convicted of corrupt and wilful Perjury, ſhall, *after ſuch conviction*, be capable of voting in any election of a Member to ſerve in Parliament, it does not annul the votes given *before conviction*, although after the commiſſion of the offence.

Hitherto the Pannel has conſidered the objection to the Proſecutor's title, in the manner moſt favourable to that Gentleman, by taking it up upon general grounds, and upon the ſuppoſition that he had charged, that he was a Freeholder of the County of Moray, and a Candidate at the laſt General Election to repreſent that County in Parliament; that the Pannel, after taking the Truſt Oath, had voted againſt him, and that he had thereby loſt his ſeat:—But, upon looking into the Criminal Letters themſelves, it appears that they are totally defective in one and all of theſe particulars, and that no peculiar character has been aſſumed by the Proſecutor, to diſtinguiſh him from the general maſs of the people, or to ſhow that he has any detached or higher intereſt to proſecute beyond that of any other of his Majeſty's ſubjects.

The Criminal Letters ſet out with theſe words: 'Forafmuchas it is humbly meant and complained unto us, 'by our Lovite Alexander Penroſe-Cumming of Altyre, Eſq; 'with concurrence of Our Right Truſty Ilay Campbell, Eſq; 'our Advocate for our intereſt, upon the Rev. Mr William 'Leſlie miniſter of the Goſpel of the pariſh of St Andrews 'and Longbride, reſiding at Darkland near Elgin, in the 'county of Elgin and Forres: THAT WHERE, by the Law 'of God, &c.' And after reciting the Act of the 7th of his late Majeſty, introducing the Oath of Truſt and Poſſeſſion,

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they go on thus: 'YET TRUE IT IS, That the ſaid William 'Leſlie, who had obtained himſelf enrolled in the Roll of 'Freeholders of the ſaid County of Elgin and Forres, upon 'pretended rights to all and whole thoſe parts and portions 'of the Lands and Eſtate of Kinneddar, &c. did, on the 15th 'of April laſt, within the Court-houſe of the borough of 'Elgin, in the county of Elgin and Forres, claim right to vote 'at the election of a Member to ſerve in Parliament for the 'ſaid County, at which Election the Complainer Alexander 'Penroſe-Cumming was Candidate: And James Brodie of 'Brodie, Eſq; a Freeholder ſtanding on the ſaid Roll, hav-'ing, in terms of the foreſaid Act of the 7th of the late 'King, required the ſaid William Leſlie to take and ſub-'ſcribe the oath above recited, he the ſaid William Leſlie 'did then and there accordingly ſwear and ſubſcribe the 'ſame, altho' he well knew that he had no right or title to 'the foreſaid parts of the lands of Kinneddar,' &c. where-'by the ſaid William Leſlie has been guilty of wilful and 'deliberate Perjury.'

Here, then, your Lordſhips will obſerve, that the Proſecutor does, in no part of theſe Criminal Letters, libel upon his intereſt, either as a Freeholder, or as a Candidate. He indeed mentions hiſtorically, in the minor propoſition, which ſurely was not the proper place for ſetting forth his own intereſt or title, that he was a Candidate at the election of a Member to ſerve in Parliament; but without mentioning what he was Candidate for, whether for being elected Member, or for being choſen Preſes or Clerk to the Meeting of Freeholders.

The Pannel therefore ſubmits it to your Lordſhips, that, *in hoc ſtatu*, the Proſecutor cannot be allowed to aſſert his having an intereſt to proſecute in the character of Candidate for the Repreſentation of the County in Parliament: And that altho' he was permitted to do ſo, yet ſtill, under theſe Criminal Letters, he cannot ſhow that he has an intereſt as

a Candidate, to complain of the Pannel for having taken the Oath of Truſt and Poſſeſſion; in reſpect that they do not charge, that after having taken that oath, the Pannel either voted for or againſt him, or gave any vote at all upon that day. They indeed maintain, That the Pannel claimed a right to vote; but it is neither alledged, nor even ſurmiſed, that he exerted that right. But, without his exerting it to the prejudice of the Proſecutor *qua* Candidate, it is impoſſible that the Proſecutor could ſuffer in that character, by the Pannel's taking the oath, however falſely or wilfully he may be ſaid to have done ſo.

It was ſaid, indeed, That the Libel implies the Pannel's having voted; becauſe it cannot be ſuppoſed that he took the oath merely for the pleaſure of ſwearing it. But it is needleſs to obſerve again to your Lordſhips, that, independent of his giving any vote at that particular Meeting, it was neceſſary for him, either to take the oath when it was put, or to allow his name to be immediately erazed from the Roll.

It was alſo ſaid, That the crime was completed by the Pannel's ſwearing the oath, without his voting after having done ſo; and this is no doubt true (if he ſwore it falſely): But then it is equally true, that unleſs he likewiſe voted againſt the Proſecutor, he committed no injury againſt him as a Candidate.

It was further ſaid, That, as in that part of the Criminal Letters already taken notice of, it was mentioned that the Proſecutor was a Candidate, it thence neceſſarily appeared that he was a Freeholder; becauſe no perſon who does not ſtand upon the Roll of Freeholders, can be choſen to repreſent a County in Parliament. But although that is legally true, yet inſtances have occurred, of perſons not only ſtanding as Candidates, but alſo of their being elected without having been previouſly enrolled. At the General Election 1780, Mr Charles Dundas was a Candidate to repreſent the County of Orkney, without being upon the Roll. He in-

deed claimed to be enrolled on the day of Election, but his claim was rejected by a majority of the Freeholders; and although he was ordered to be added to the Roll by the Court of Seſſion, and his qualification was ſuſtained as ſufficient to entitle him both to vote, and to be elected, by a Committee of the Houſe of Commons, who decided the merits of the election in his favour; yet it is certain, that, at the time of that election, he did not ſtand upon the Roll: And, for ought that appears from the Criminal Letters, Mr Cumming of Altyre may have been in the ſame ſituation, and may only have claimed to be enrolled as a Freeholder at the Meeting for Election; and even after the Pannel had taken the Oath of Truſt and Poſſeſſion, which is not ſaid to have been put to him by Mr Cumming, but by 'James 'Brodie of Brodie, Eſq; a Freeholder ſtanding on the ſaid 'Roll.'—A ſtill ſtronger inſtance is, however, known to have happened in the County of Caithneſs, where Lord Fortroſe was choſen a Member of Parliament, without either being upon the Roll, or claiming to be admitted to it; and ſat in the Houſe of Commons, for a whole Parliament, in conſequence of that Election.

The Pannel will alſo here be allowed to obſerve, that the plea he is now maintaining, is ſtrongly confirmed by the latter part of the interlocutor of the Court, in Mr Dempſter's caſe.

It was likewiſe ſaid for the Proſecutor, That altho' the Criminal Letters did not ſtate in the beginning, his being either a Freeholder or a Candidate; yet as, in their concluſion, the Pannel was deſired to take notice that the record or minutes of the Election were to be uſed in evidence againſt him, and to be lodged in due time in the hands of the Clerk of Court, ſuch record or minutes muſt be conſidered as part of the Libel; and that from theſe it muſt appear, not only that the Proſecutor was both a Freeholder and a Candidate, but alſo that the Pannel voted againſt him,

him, and for Earl Fife, to repreſent the County in Parliament.

This, however, will not avail the Proſecutor in the queſtion, or ſupply the defect in the Criminal Letters, ariſing from their not ſtating his title to proſecute: For, in the *firſt* place, it is perfectly clear, that the Pannel was deſired to take notice of theſe papers only in reſpect that they were to be uſed in evidence of his guilt, and not becauſe they were to be uſed in evidence of a particular character aſſumed by the Proſecutor, as entitling him to purſue: And, in the *next* place, none of theſe papers are as yet produced, or can be taken under the conſideration of your Lordſhips: On the contrary, a Petition which the Proſecutor preferred in the view of obtaining a warrant from the Court for recovering them, has been laid over, until it ſhall be determined whether or not he has any title to inſiſt in the preſent action.—It is therefore not a little ridiculous in the Proſecutor, to attempt to hold theſe papers as part of the Criminal Letters.

Under this branch of the argument, the Pannel is nowiſe called upon to maintain, That a private Proſecutor's title muſt not only be ſtated, but muſt actually be proved before the diet of compearance; or that when a queſtion ariſes with regard to a matter of fact, reſpecting the title that is aſſumed by the Libel, a Proof cannot be allowed. Where a perſon executes Criminal Letters againſt one as guilty of the murder of his elder brother, or other relation to whom he himſelf ſucceeds as heir, and the Pannel diſputes the Proſecutor's ſtanding in that degree of relation to the defunct, it may perhaps be competent to the Proſecutor, to eſtabliſh that fact by the production of his ſervice; and there ſhould ſeem to be no impropriety in the Court's allowing him even a time to do ſo.—In like manner, had the preſent Criminal Letters bore, That they were inſiſted in by the Proſecutor as a Freeholder of the County of Moray, and as a Candidate to repreſent that County in the preſent

preſent Parliament, and that the Pannel had voted againſt him at the Election, it might perhaps have been competent to him, either to have produced the Minutes of the Freeholders in evidence of theſe facts, or to have applied to your Lordſhips for a warrant to recover them, if theſe facts had been denied or diſputed on the part of the Pannel. But as no ſuch facts are averred by the Proſecutor in the Criminal Letters, it is impoſſible that he can be allowed a Proof of them for any purpoſe whatever; and if he, and thoſe in whom he confides, have been guilty of an egregious blunder in that reſpect, they muſt ſubmit to the legal conſequences of that blunder; and the Pannel muſt be entitled to inſiſt that he ſhall be *ſimpliciter* aſſoilzied, and diſmiſſed from the Bar, in reſpect that the Proſecutor has, by his own Summons, qualified no proper intereſt or title to proſecute.

The Proſecutor ſeems indeed to think himſelf entitled to defend every propoſition which he finds it neceſſary to maintain, however ſtrange and extraordinary, or inconſiſtent with the known and eſtabliſhed forms of judicial procedure. He is accordingly pleaſed to tell your Lordſhips, and gravely too, that it is not neceſſary that the Proſecutor ſhould libel title or intereſt; and that it is ſufficient that he eſtabliſhes them when he comes to inſiſt. But altho' the cogniſance of the title no doubt belongs entirely to the Court, and cannot poſſibly go to the Jury, as until it be aſcertained, the Pannel is not obliged to plead to the charge; ſtill it is abſolutely neceſſary that the Indictment, or Criminal Letters raiſed at the inſtance of a private party, ſhall be ſo framed, as to ſhow under what character, or upon what ground, ſuch private party comes to aſſume to himſelf the power of proſecuting a crime: And although the Proſecutor has diſcovered caſes where the procedure has been ſtopped until the title *aſſumed* by the Raiſer of the Criminal Letters ſhould be proved, yet he neither has, nor can produce even a ſingle inſtance of a party's being allowed a proof of

of that ſort, when he had totally neglected to *libel* any title or intereſt, or to aſſume a character in which they were implied. He has indeed mentioned in his Information, one caſe of a ſimilar nature to the preſent, *viz.* that of Murdoch *contra* Cannan, where it is ſaid, that the libel neither ſet forth the character of Freeholder, nor that of Candidate, to have been in the Proſecutor.—But, according to the account that is given of that caſe by the preſent Proſecutor, it ſhould ſeem that the Pannel did not think fit to appear, but allowed a ſentence of fugitation to be paſſed againſt him. It therefore cannot, with any degree of propriety, be quoted as a precedent to ſanctify ſo egregious a blunder; and it is probable, that Mr Cannan had been too conſcious of his own guilt, to think that he could remain longer in this country with any degree of ſatisfaction; and rather choſe to deſert it altogether, than to render himſelf more conſpicuous by appearing in Court, even when he had a good objection to the Proſecutor's title.

Nor will it avail the Proſecutor to obſerve, That when a Libel is exhibited in the name of a private party, with concourſe of his Majeſty's Advocate, there is *prima facie* a good title to proſecute, or otherwiſe the Advocate's concourſe muſt be a mere empty form. The Pannel is adviſed, that it is in fact nothing elſe; and that it is granted of courſe, without any inquiry whether the private party has any title or not to carry on the proſecution. When the King's Advocate's concourſe is aſked, he has no opportunity of ſeeing the Libel, unleſs he happens to be of Counſel with the Proſecutor; in which caſe, his advice will probably be taken, and followed as to the manner of forming it. That, however, does not always happen; and to ſuppoſe that his concourſe alone will ſupply the defect ariſing from the private party's being unable, or neglecting to qualify in his Libel, any proper intereſt or title in his own perſon to proſecute, ſeems to the Pannel too chimerical a notion to merit a ſerious conſideration.

The Proſecutor appears, indeed, to be now perfectly ſenſible, that no further procedure can take place under a Libel framed in the manner according to which the preſent Criminal Letters have been drawn. Your Lordſhips have had occaſion to know, that other two of the Freeholders of this County have likewiſe been ſerved with Criminal Letters, conceived preciſely in the ſame terms: But in theſe, the Proſecutor has ſhown, that he dare not confide; for he has already ſerved both, or at leaſt one of theſe Gentlemen, with new Libels, in which he has endeavoured to correct and ſupply ſome of the blunders and defects of the former.

But altho' the Pannel is ſatisfied that the defects of the Criminal Letters that have been executed againſt him, muſt in all events be fatal to the preſent inſtance, yet he humbly apprehends that it was nowiſe neceſſary for him to have ſaid a ſingle word upon that head; and flatters himſelf, that your Lordſhips will be clearly of opinion, that altho' the Libel had been perfectly free of all theſe defects, the Proſecutor could not qualify a ſufficient title in his perſon, either as a Freeholder, or as a Candidate, to exhibit a charge of Perjury againſt the Pannel, on account of his having taken the Oath of Truſt and Poſſeſſion at the laſt Election for the County of Moray; and that, as his Majeſty's Advocate has not thought it proper to proſecute at his own inſtance, no procedure whatever can take place.

The Pannel ſhould think himſelf to blame, were he to conclude without taking ſome notice of an aſſertion made by the Proſecutor in the beginning of his Information. Taking it for granted, that all who are admitted to the Roll of Freeholders, come of courſe to be Commiſſioners of Supply, and Juſtices of the Peace, he has been pleaſed to tell your Lordſhips, That as wherever the practice of ſplitting has prevailed, the Nominal or Parchment Barons greatly outnumber the Real Freeholders, ſo the whole power and management of the County Elections, Police and Juriſdictions,

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are all transferred to theſe counterfeits, though peculiarly diſqualified for the truſt, as they are, and muſt be the confidents or creatures of powerful Peers, or overgrown Commoners: And it is further ſaid, that this abuſe has not been carried to a greater height in any county in Scotland than in the county of Moray, where the Real Freeholders have not only had Repreſentatives ſent to Parliament contrary to their inclination, and without the leaſt attention and regard to their wiſhes, but alſo, in leſſer matters, have been obliged to give up all attendance, finding themſelves outvoted in every queſtion; ſo that almoſt every bridge has been built, and every high-way directed, not with a view to the convenience of the Public, but to that of ſome one or other of thoſe imaginary Proprietors; and the moſt unjuſt deciſions have been pronounced in queſtions upon the Revenue Laws, adjudging recruits, and other matters which are the ſubject of county juriſdiction. The Proſecutor ought, however, to have known, that no Freeholder, however large his property may be, can be named a Commiſſioner of Supply, but by Parliament; or be appointed a Juſtice of the Peace, but by his Majeſty: and that the inſtances of putting perſons who have no farther intereſt in a county than their being poſſeſſed of a liferent or wadſet-right of ſuperiority, either into the Commiſſion of Land-Tax, or into the Commiſſion of Juſtices, are far from being frequent.—The Pannel has indeed heard, that it has been generally made a matter of reproach to ſuch Freeholders, that their faces are ſeldom ſeen in the counties where their freeholds are ſituated, except at Michaelmas Head-Courts, or Meetings for Election. But be this as it will, it is moſt unpardonable in the Proſecutor to aſſert, that in the county to which he belongs, thoſe grievances have been felt, which he ſuppoſes to ariſe from the introduction of a number of ſuperiority-qualifications. On the contrary, the Pannel has good reaſon to know, that the greateſt attention has always been

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paid to the general police and improvement of the county, without partiality or diſtinction; and he defies the Proſecutor to point out a ſingle inſtance, either of the public money having been miſapplied, or of juſtice having been perverted, by unjuſt deciſions pronounced in queſtions reſpecting the Revenue Laws, the adjudging recruits, or any other matters that fall under the juriſdiction of the Juſtices of the Peace, or of the Commiſſioners of the Land-Tax.

In reſpect whereof, &c.

ALEX^R. WIGHT.